90-196

No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1990

STATE SALVAGE, INC.,
A CALIFORNIA CORPORATION;
COUNSEL FOR STATE SALVAGE, INC.

Petitioners,

v.

SUPERIOR COURT
OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF LOS ANGELES

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Attorneys for Petitioners
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Los Angeles, CA 90017
(213) 688-1198

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OF THE STATE OF CALIFORNIA,
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11th Floor
Los Angeles, CA 90017
(213) 688-1198

QUESTION PRESENTED FOR REVIEW

1. Whether issuance of a warrant for an unannounced search of a law firm for a single client's business records is reasonable and thus constitutional when: the law firm is not a subject or target of any investigation; the law firm is not believed to present a threat to the integrity of the documents sought; the law firm has made the documents available to all government agencies seeking the documents; and no prior consideration of less intrusive means to acquire the documents is given by the law enforcement agency which seeks the warrant.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption of this matter, the Attorney General of the State of California, John Van de Kamp, is an interested party, having opposed the relief sought by Petitioners from the Superior Court of California.

Petitioners have no parent or subsidiary corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CONSTITUTIONS

OTHER

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE SALVAGE, INC.,
A CALIFORNIA CORPORATION;
COUNSEL FOR STATE SALVAGE, INC.

. . . . . .Petitioners,

v.

SUPERIOR COURT
OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF LOS ANGELES

. . . . . Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

State Salvage, Inc. and its counsel, Beck & De Corso, A Professional Corpora-

tion, petition for a writ of certiorari to review an order of the Supreme Court of California. That court rejected Petitioners' request for review of the denial of their petition to the California Court of Appeal for a writ of mandate ordering the Los Angeles Superior Court to quash a warrant issued for the search of the offices of Petitioner Beck & De Corso.

Alternatively, Petitioners seek a writ of mandamus or prohibition directing the Supreme Court of California to reverse its order denying review.

OPINIONS BELOW

There have been no official or unofficial reports of the decisions rendered in this case.

JURISDICTION

On April 25, 1990, the Supreme Court of California issued its Order Denying Review After Judgment by the Court of Appeal.

Pursuant to 28 U.S.C. section 1257(a), "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y writ of certiorari . . . where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition arises out of a viola-

tion of the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The unconstitutional search made the subject of this Petition was executed pursuant to California Penal Code section 1524(c), governing searches of law offices, which is set forth in its entirety in the Appendix to this Petition. (See Appendix E.)

/ / /

STATEMENT OF THE CASE

Petitioner State Salvage, Inc., a California Corporation formed in June 1966, engages in the purchase and sale of scrap metals, including aluminum beverage cans. In approximately October 1988, State Salvage became certified as a recycler under the 1986 California Beverage Container Recycling and Litter Reduction Act ("the Act"), which is administered by the California Department of Conservation ("DOC"). (See Declaration of Teresa Barrera, ¶¶3 and 4, attached as Exhibit C of the Appendix to the Petition for Peremptory Writ of Mandate.)[1]

The Act established a recycling program pursuant to which California consum-

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[1] . The Peremptory Writ of Mandate was filed with the California Court of Appeal on January 22, 1990.

ers pay a surcharge on beverages sold in aluminum containers and receive the scrap value of the containers, as well as redemption value and a bonus, when they return the containers to certified recycling centers. The recycling centers then sell the aluminum containers to another recycler or to a certified processor for scrap values and reimbursement of the applicable redemption values and bonuses they have paid consumers, together with an administrative fee provided for in the Act. The DOC in turn reimburses the certified processor for redemption values, bonuses and administrative fees paid to certified recyclers and pays the processor its own administrative fee. (See California Public Resources Code 14500 et seq.)

In approximately February 1989, the

DOC began an audit of the books and records of State Salvage as they pertained to the Act. The audit took approximately eight months. After the conclusion of the audit, the DOC alleged that State Salvage was required to reimburse the State of California for receiving Act payments to which the company was not entitled. (See Declaration of Teresa Barrera, ¶¶5 and 6, attached as Exhibit C of the Appendix to the Petition for Peremptory Writ of Mandate.)

On October 12, 1989, State Salvage retained a law firm, Petitioner Beck & De Corso, a Professional Corporation, to represent it with respect to the DOC allegations. The following day, Mark Beck of Beck & De Corso telephoned counsel for the DOC and asked for substantiation of the allegations, as well as an opportuni-

ty to discuss the case. A letter was sent reiterating these requests on October 16, 1989. (Id at ¶8.) Over the next several weeks, Beck & De Corso made numerous similar requests, by telephone and in writing, for additional information. The DOC failed to respond. (Id.)

In his initial telephone conversation with the DOC, Mr. Beck also asked whether its investigation had been referred to the California Attorney General's Office. He was told that an Attorney General investigator might be looking at the case, but that no Deputy Attorney General had been assigned. (Id. at ¶9.)

After failing to obtain from the DOC any substantiation for the allegations, Beck & De Corso took possession of certain State Salvage business documents for the purpose of having an independent au-

dit conducted. (Id. at ¶10.)

On approximately October 25, 1989, State Salvage was contacted by Alan Cates, an auditor with the State Controller's Office. Mr. Cates said he was reviewing documents pertaining to State Salvage and the recycling program, and requested access to State Salvage business documents. Mr. Cates was invited to State Salvage and given the opportunity to review documents there. He also was informed that many of the documents were at the offices of Beck & De Corso. An appointment was arranged for October 26, 1989 to allow Mr. Cates to review and obtain documents from Beck & De Corso. State Salvage reiterated to Mr. Cates its willingness to cooperate with agencies involved in the recycling program. (Id. at ¶11.)

During Mr. Cates' visit to Beck & De Corso, he was given access to all State Salvage documents he requested. (Id.)

In the days following Mr. Cates' visit, Beck & De Corso persisted in its attempts to obtain information from the DOC, again without success. During that same period, the auditors employed by Beck & De Corso continued their review of the documents for the purpose of independently investigating the DOC allegations. (Id. at ¶14.)

On November 21, 1989, at approximately 1:30 p.m., the California Attorney General's Office executed three search warrants at State Salvage, Inc., Beck & De Corso[2], and the office of the accoun-

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[2] Only the search of Beck & De Corso is at issue in this Petition.

tant for State Salvage. The warrants sought virtually all business documents pertaining to State Salvage during the period of participation by State Salvage in the recycling program.

The affiant who requested the warrant acknowledged that he learned from Mr. Cates that the latter had visited State Salvage and had also visited Beck & De Corso, met with Mark Beck and been permitted "to inspect the contents of the boxes, which contained State Salvage business records and shipping reports." (See Affidavit, p. 3, attached as Exhibit A of the Appendix to the Petition for Peremptory Writ of Mandate.)

The November 21, 1989 announcement by agents for the Attorney General that a warrant was to be executed was the first time Beck & De Corso learned that the

Attorney General had become formally involved in the case. The warrant was not preceded by any effort on the part of the Attorney General to obtain any of the documents by any means less intrusive than a search warrant. (See Declaration of Teresa Barrera, ¶15, attached as Exhibit C of the Appendix to the Petition for Peremptory Writ of Mandate.)

The search of Beck & De Corso was executed pursuant to California Penal Code section 1524(c), governing searches of law offices not suspected of wrongdoing. (See Appendix E.)

During the course of the search at Beck & De Corso, all of the State Salvage business records in the possession of Beck & De Corso were seized. (See Declaration of Angela E. Oh, ¶¶ 2-4, attached as Exhibit C of the Appendix to the Peti-

tion for Peremptory Writ of Mandate.)

Immediately following the search, Beck & De Corso contacted the Attorney General and learned from the Deputy Attorney General handling the matter that, although she viewed Beck & De Corso merely as a custodian of documents (and not a suspect), she had not inquired about the reputation or integrity of Beck & De Corso or about its conduct on previous occasions when Beck & De Corso had served as counsel for subjects of criminal investigations. (See Declaration of Teresa Barrera, ¶23, attached as Exhibit C of the Appendix to the Petition for Peremptory Writ of Mandate.)

In fact, the Attorney General had no basis whatsoever for doubting that the documents would be preserved by Beck & De Corso or that Beck & De Corso would

respond promptly and properly to a request for the documents. (Id.) Rather, the Deputy Attorney General explained that the search warrant was executed at Beck & De Corso simply because it was the most expedient way to acquire the documents at the commencement of the Attorney General's involvement in the case. (Id.)

On November 27, 1989, Petitioners filed in the Superior Court of California, for the County of Los Angles, a Motion to Quash Search Warrant Served Upon Counsel and Motion for Franks[3] Hearing.[4] (See Exhibit C of the Appendix to the Petition for Peremptory Writ of Mandate.) In the Motion, Petitioners argued, inter

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[3] Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

[4] Only the Motion to Quash is at issue in this Petition.

alia, that the issuance of the search warrant was unreasonable and thus unconstitutional because Beck & De Corso was not a target or suspect in any investigation; Beck & De Corso did not pose a threat to the integrity of the documents; Beck & De Corso had made the documents available to two other state agencies; and the Attorney General did not consider acquiring the documents by less intrusive means during the few weeks in which it was involved in the investigation.

On December 8, 1989 and December 21, 1989, Petitioners' Motions were heard by the Superior Court. On December 21, 1989, the court denied the Motions. (See Appendices B and C.)

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On January 22, 1990, Petitioners filed a Petition For Peremptory Writ of Mandate with the Second Appellate District, Division One, of the California Court of Appeal. On January 31, 1990, the Court of Appeal issued its Order denying the Petition without an opinion. (See Appendix D.) On February 9, 1990, Petitioners filed a Petition for Review with the Supreme Court of California. That Petition was denied on April 25, 1990 without issuance of an opinion. (See Appendix A.)

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THIS COURT SHOULD RESOLVE AN IMPORTANT QUESTION ABOUT THE REASONABLENESS OF SEARCHES OF ATTORNEYS' OFFICES.

A. Introduction.

This Petition addresses the issue of when it is reasonable to search the office of a non-suspect attorney. Petitioners contend that when attorneys are not targets of any investigation, do not present a threat to the integrity of the documents, and have made the documents available to all government agencies seeking the documents, law enforcement agents must consider and use less intrusive alternatives than service of an unannounced search warrant. When such circumstances exist and less intrusive alternatives are not used, the search should be declared unconstitutional.

This Petition should be granted be-

cause some guidance from this Court is necessary to maintain the delicate balance between the concerns of clients and attorneys over confidentiality, and the rights of police authorities to investigate and secure evidence of criminal activity. The legitimate efforts of attorneys should not be sacrificed in the name of expedient criminal investigation when alternatives to intrusive searches are readily available and effective. See Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290, 301 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.")

B. All Searches Must Be Reasonable.

The Fourth Amendment requires that

all searches and seizures be reasonable. This Court has explicitly stated that the reasonableness requirement applies even to searches conducted pursuant to a warrant. Zurcher v. Stanford Daily, 436 U.S. 547, 565, 98 S.Ct. 1970, 56 L.Ed.2d 525, 541 (1978) ("the preconditions for a warrant [are] -- probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness").[5]

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[5] This Court also stated in Zurcher:

> This is not to question that "reasonableness" is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized.

436 U.S. at 559-560, 56 L.Ed.2d at 538.

Reasonableness is determined by balancing the authorities' need to search against the impact of the intrusion upon the individual's privacy and security. See Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660, 667 (1979). "'A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting as with respect to another kind of material.'" Zurcher, supra, 436 U.S. at 564, 56 L.Ed.2d at 541, citing Roaden v. Kentucky, 413 U.S. 496, 501, 93 S.Ct. 2796, 37 L.Ed.2d 757, 763 (1973). As a result:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. . . . Courts must consider the scope of the particular intrusion, the manner in which it is

> conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed. 2d 447, 481 (1979).

In view of the foregoing, the determination of reasonableness should include the consideration of less intrusive means. See, e.g., Prouse, supra, 440 U.S. at 659, 59 L.Ed.2d at 671. ("Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.") Such consideration is especially appropriate when a search is executed against individuals who are not suspected of wrongdoing. See Zurcher, supra, 436 U.S.

at 570 n.2, 56 L.Ed.2d at 544 n.2 ("Similarly, the magnitude of a proposed search directed at any third party, together with the nature and significance of the material sought, are factors properly considered as bearing on the reasonableness and particularity requirements. Moreover, there is no reason why police officers executing a warrant should not seek the cooperation of the subject party, in order to prevent needless disruption." [Powell, J., concurring, emphasis in original].)

The consideration of less intrusive alternatives is particularly important when the third party to be searched is an attorney. Any search of a law office threatens the attorney-client privilege, client confidentiality, the work product doctrine, and the criminal defendant's

right to counsel. Klitzman, Klitzman and Gallagher v. Krut, 744 F.2d 955, 961 (3d Cir. 1984); O'Connor v. Johnson, 287 N.W. 2d 400 (Minn. 1979), cited approvingly in Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 261, 162 Cal. Rptr. 857, 862 (1980). Indeed, service of a warrant may effectively halt counsel's ability to prepare the defense of the client who is the subject of the investigation. Thousands of necessary documents may be seized, as was done in this case. In such circumstances, access to the documents is subject to the consent and (if consent is granted) the schedules of the investigating authorities.

The foregoing interests of attorney and client must be respected, particularly when the attorney is the subject of a search simply because he possesses re-

cords of a client who is under criminal investigation. It must be remembered that service of a warrant (especially during regular business hours) sends an incorrect, prejudicial message to clients, potential clients, the public, and colleagues of the attorney whose office is searched. Attorneys are officers of the court, sworn to uphold the law. The search of a non-suspect law office by police authorities causes prejudice which cannot be remedied by the unpublished explanation that the law firm is merely a custodian of records and not suspected of any misconduct.[6]

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[6] Justice Stevens recognized in Zurcher that:

> Countless law-abiding citizens -- doctors, lawyers, merchants, customers, bystanders -- may have documents in their possession that relate to an ongoing criminal investi-

(continued...)

Less intrusive alternatives to searches of non-suspect attorney offices are especially appropriate, not just because they reduce or avoid undue prejudice to the attorney and all of his clients, but also because alternatives are particularly likely to be effective in achieving the legitimate goals of the police authorities. Attorneys, as officers of the court, have legal and ethical obligations not to destroy evidence and to cooperate with any lawful request for

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[6](...continued)
gation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. . . . The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched.

Zurcher, 436 U.S. at 579-580, 56 L.Ed.2d at 550-551 (Stevens, J., dissenting).

documents. See e.g., California Rule of Professional Conduct 5-220 ("A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.") Further, an attorney (particularly one not a subject of investigation) should be presumed to honor these obligations, unless there is some evidence to the contrary. See Geders v. United States, 425 U.S. 80, 93, 96 S.Ct. 1330, 47 L.Ed.2d 592, 602 (1976) ("If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client.") (Marshall, J., concurring). See also Klitzman, supra (Third Circuit specifically ordered that a law firm be given an opportunity to produce documents voluntarily, before

the law firm could be searched even though one member of the firm was a suspect in a criminal investigation).

Given the significant interests threatened by searches of non-suspect attorney offices, and the availability of less intrusive alternatives, various jurisdictions have restricted such searches.

For example, the United States Congress has required that federal search warrants be issued against any third party witnesses (including law firms) not suspected of wrongdoing only if less intrusive means are deemed unlikely to result in obtaining the documents sought. 42 U.S.C §2000aa-11. The particular standards governing the issuance of warrants are set forth in 28 C.F.R. 59 et

seq.[7]

Because of these limitations, United States Attorneys are prohibited from seeking warrants for searches of law firms without the express approval of a Deputy Assistant Attorney General in Washington, D.C. 28 C.F.R. §59.4(b)(2).

Similar limitations have been im-

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[7] The relevant portion of the Code of Federal Regulations provides:

> A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party . . . lawyer . . . unless -- [i]t appears that the use of a subpoena, summons, request or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought.

28 C.F.R. 59.4(b) (A copy of the pertinent C.F.R. provisions is attached as Exhibit C to the Declaration of Mark E. Beck in Exhibit E of the Appendix to the Peremptory Writ of Mandate.)

posed internally by the United States Department of Justice upon its prosecutorial staff in the use of grand jury subpoenas. Forthwith subpoenas (which are the functional, albeit less intrusive, equivalent of a search warrant) are expressly prohibited in the absence of some threat to the integrity of the documents. See Department of Justice Manual, §9-11.240. (A copy of the Manual is attached as Exhibit D to the Declaration of Mark E. Beck in Exhibit E of the Appendix to the Petition for Peremptory Writ of Mandate.)

Three states have gone further than Congress and the Department of Justice and banned altogether searches of non-suspect law offices. See Oregon Statutes §9.695, Wisconsin Statute §968.13, and O'Connor v. Johnson, supra (Minn.).

In California, where the search at issue took place, the state legislature addressed some concerns about searches of attorney offices by amending Penal Code section 1524 in 1979.[8] (See Appendix E.) That statute, in relevant part, provides that a search warrant executed at the offices of non-suspect attorneys must be supervised by a Special Master appointed

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[8] The statute has been addressed in only one reported case concerning the search of non-suspect attorneys, Deukmejian v. Superior Court, 103 Cal. App. 3d, 162 Cal. Rptr. 857 (1980). The Deukmejian court vacated an injunction which barred the search of a law office precisely because Penal Code section 1524, which had just been enacted, appeared to resolve the privilege issues raised before the court. The court refused to predict whether the provisions of section 1524 would be effective in resolving issues other than privilege, expressing a belief that such issues would likely be raised before California appellate courts again. In fact, they were not.

by the magistrate issuing the search warrant. The statute further provides that the Special Master must review all documents sought under the search warrant for claims of privilege.[9]

While the statute codifies how a search of a law office must be executed in order to be reasonable, it is silent with respect to when it is reasonable to conduct such a search in the first place. It is that silence which led to the unconstitutional search made the subject of this Petition.

Several facts compel the conclusion that the search of the law office of Beck

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[9] In Klitzman, supra, 744 F.2d at 962, the Third Circuit cited with approval the California procedure, and recommended its use if documents were not produced voluntarily by the law firm in possession of them.

& De Corso by agents of the California Attorney General was unreasonable although executed pursuant to a warrant. These facts are set forth below.

First, as the California Attorney General acknowledged, Beck & De Corso never was a target or suspect in the criminal investigation. (It is for that reason that the search was conducted pursuant to the provisions of California Penal Code section 1524(c), which sets out the procedures for searches of non-suspect law offices.) Rather, one of its clients, State Salvage, was the subject of an investigation by the DOC, and Beck & De Corso was known to possess some of that client's records.

Second, there was no reason for the California Attorney General to believe there was any risk the desired documents

would be destroyed. Beck & De Corso had made the documents available to the DOC and the State Controller. A representative of the Controller's office had even been permitted to remove certain State Salvage documents from Beck & De Corso's possession.[10]

Third, the unannounced removal of State Salvage documents in the possession of Beck & De Corso interfered with the latter's ability to carry out its professional responsibility to its client.

Fourth, far less intrusive methods were available which would have assured

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[10] Indeed, the affiant for the warrant at issue stated in his affidavit that Alan Cates, the auditor with the State Controller's Office, had been to the offices of Beck & De Corso to examine documents, and had told the affiant of his visit. No warrant had been needed by Mr. Cates to obtain access to the documents held by Beck & De Corso.

the acquisition of the desired documents without causing any prejudice to State Salvage or Beck & De Corso. The Attorney General could have obtained a subpoena, or could have gained access to the documents informally (as Mr. Cates had), or could have provided advance notice to Beck & De Corso that the search warrant would be served.

Those means would have sufficed because a subpoena carries the force of law and the ethical obligations of Beck & De Corso would have required it to respect even an informal request or advance notice of a planned search.

In the context of the foregoing, the Zurcher case is most illuminating and sharply distinguishable.[11] In Zurcher,

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[11] In Zurcher, the issue before the Court was quite similar to the issue
(continued...)

the police executed a search warrant against a newspaper which was believed to be the custodian of certain documents. The newspaper had earlier announced a policy of destroying documents of the type which were sought in the search warrant. 436 U.S. at 568 n.1, 56 L.Ed.2d at 543-544 n.1 (J. Powell, concurring). Attacking the constitutionality of the

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[11](...continued)
raised here, namely:

> how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring.

436 U.S. at 553, 56 L.Ed.2d at 534.

resulting search, the newspaper argued it was unreasonable, and sought a requirement that all searches of non-suspect third-parties, and particularly newspapers, be preceded by an attempt to obtain documents by subpoena, a less intrusive means.

This Court rejected such a hard and fast rule, and found that the search was reasonable under all of the circumstances presented.

Here, in contrast, Petitioners are not seeking a ruling that all searches of non-suspect attorney offices are, per se, unreasonable. Petitioners seek, instead, a ruling that the search in this case was unconstitutional because of the circumstances in which it took place. The searching authorities had no evidence that an unannounced search was necessary.

To the contrary, they had ample evidence (including previous instances of cooperation by Beck & De Corso) that even informal efforts to obtain the documents would have been successful.

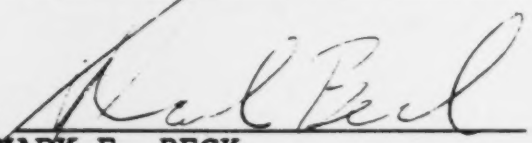
CONCLUSION

Based on the foregoing, Petitioners request that this Court grant their Petition for a Writ of Certiorari to the Supreme Court of California.

Dated: July 24, 1990

Respectfully submitted,

BECK AND DE CORSO
A PROFESSIONAL CORPORATION

By 
MARK E. BECK
Attorneys for Petitioners

Appendix A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division One
No B047642
S014111

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

STATE SALVAGE INCORPORATED, Petitioner,

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent,

THE PEOPLE, Real Party In Interest

Petition for review DENIED

MOSK
Acting Chief Justice

Appendix B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DEPT. 103

Date: 12/21/89

HONORABLE:CURTIS B RAPPE JUDGE
W DOWNS Deputy Sheriff

G BARR Deputy Clerk
E Smith Reporter
HC206565 (Parties and counsel checked if present)

IN RE SEARCH WARRANT 30685
EXECUTED AT OFFICES OF
COUNSEL FOR STATE SALVAGE, INCL [sic],
A California Corporation

Counsel for Respondent:
L JOHNSON, Atty General
R PREMINGER, Atty General
Counsel for Moving Party:
M. Beck, Pvt
A. DeCorso, PVT

NATURE OF PROCEEDINGS — MOTION TO QUASH SEARCH WARRANT AND MOTION FOR HEARING PURSUANT TO FRANKS V. DELAWARE

The Court finds a prima facie case has not been shown to warrant a Franks hearing.

Motion to quash search warrant is denied.

The reporter is directed to prepare an original and three copies of a transcript of the proceedings heard in this matterxon [sic] December 8, 1989; December 15, 1989; and December 21, 1989.

MINUTE ORDER
MINUTES ENTERED 12/21/89
COUNTY CLERK

Appendix C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 103

HON. CURTIS B. RAPPE, JUDGE

IN RE SEARCH WARRANT EXECUTED AT LAW OFFICES OF COUNSEL FOR STATE SALVAGE, INC., A CALIFORNIA CORPORATION

SEARCH WARRANT NO. 30695

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, DECEMBER 21, 1989

APPEARANCES:

DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL BY: LINDA C. JOHNSON AND ROY C. PREMINGER, DEPUTIES

FOR STATE SALVAGE:

BECK & DE CORSO BY: MARK E. BECK AND ANTHONY DE CORSO, ATTORNEYS

EVA ADELE SMITH, CSR NO. 3360 OFFICIAL REPORTER

[p. 159]

THE COURT: I MUST SAY THE DIFFICULTY WITH THIS ISSUE IS THAT PERSONALLY MY FEELING HAVING PRACTICED UNDER THE SAME SYSTEM AS MR. BECK IN THE FEDERAL SYSTEM AND KNOWING MR. BECK AND THE INTEGRITY OF HIS FIRM, THAT I DON'T HAVE ANY DOUBT THAT THE ATTORNEY -- HAD THE ATTORNEY GENERAL ASKED HIM FOR THE DOCUMENTS THEY WOULD HAVE BEEN SUPPLIED IN ITS [p. 160] ENTIRETY. THAT DOESN'T REALLY SETTLE THE ISSUE.

I HAVE TO DECIDE IT AS A MATTER OF LAW AND NOT BASED UPON MY PERSONAL EXPERIENCES, AS I SAY, IN ANOTHER SYSTEM AND WITH MR. BECK. I HAVE THE HIGHEST REGARD FOR MR. BECK. AS I SAY, I HAVE ABSOLUTELY NO DOUBT THAT HE WOULD HAVE TURNED THEM OVER.

BUT AS A LEGAL PROPO-

SITION TO LIMIT THE PEOPLE TO A STANDARD THAT WOULD REQUIRE THEM TO BASE IT ON THE PERSONAL INTEGRITY OF THE ATTORNEY INVOLVED, JUST SEEMS TO ME IS NOT SOMETHING THAT IS REASONABLE. AND I DON'T, IN READING THE CASES IN THE AREA, FIND THAT THAT IS WHAT IS REQUIRED HERE. SO I WILL DENY THE MOTION ALSO ON THAT GROUND.

AS I SAY, IT IS A VERY VERY DIFFICULT ISSUE BECAUSE IT DOES SEEM TO ME THERE IS A GREAT DEAL OF DANGER FOR LAW FIRMS AND THEIR CLIENTS TO SUFFER PREJUDICE BUT I DON'T THINK IT WAS UNREASONABLE IN THIS PARTICULAR INSTANCE THAT THE ATTORNEY GENERAL PROCEEDED, AND I FIND THAT THE MANNER OF THE EXECUTION OF THE SEARCH WARRANT WAS ENTIRELY APPROPRIATE UNDER THE PENAL CODE 1524.

Appendix D

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STATE SALVAGE, INC., etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

JOHN VAN DE KAMP, ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Real Party in Interest.

B047642

(Search Warrant No. 30695)

(CURTIS B. RAPPE, Judge)

ORDER

COURT OF APPEAL - SECOND DISTRICT
FILED JAN 31, 1990

ROBERT N. WILSON Clerk
Deputy Clerk

THE COURT:

The petition for writ of mandate/stay, filed January 22, 1990, has been read and considered.

The petition is denied.

Appendix E

§1524. Issuance; grounds; special master

(a) A search warrant may be issued upon any of the following grounds:

(1) When the property was stolen or embezzled.

(2) When the property or things were used as a means of committing a felony.

(3) When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing its being discovered.

(4) When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

(5) When the property or things to be seized consist of evidence which tends to show that sexual exploitation of a child, in violation of Section 311.3, has occurred or is occurring.

(b) The property or things described in subdivision (a) may be taken on the warrant from any place, or from any person in whose possession it may be.

(c) Notwithstanding subdivision (a) or (b), no search warrant shall issue for any documentary evidence in the possession or under the control of any person, who is a lawyer as defined in Section 950

of the Evidence Code, a physician as defined in Section 990 of the Evidence Code, a psychotherapist as defined in Section 1010 of the Evidence Code, or a clergyman as defined in Section 1030 of the Evidence Code, and who is not reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence for which a warrant is requested unless the following procedure has been complied with:

(1) At the time of the issuance of the warrant the court shall appoint a special master in accordance with subdivision (d) to accompany the person who will serve the warrant. Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested. If the party, in the judgment of the special master, fails to provide the items requested, the special master shall conduct a search for the items in the areas indicated in the search warrant.

(2) If the party who has been served states that an item or items should not be disclosed, they shall be sealed by the special master and taken to court for a hearing.

At the hearing the party searched shall be entitled to raise any issues which may be raised pursuant to Section 1538.5 as well as a claim that the item or items are privileged, as provided by law. Any such hearing shall be held in the superior court. The court shall provide sufficient time for the parties to obtain counsel and make any

motions or present any evidence. The hearing shall be held within three days of the service of the warrant unless the court makes a finding that the expedited hearing is impracticable. In that case the matter shall be heard at the earliest possible time.

(3) Any such warrant must, whenever practicable, be served during normal business hours. In addition, any such warrant must be served upon a party who appears to have possession or control of the items sought. If after reasonable efforts, the party serving the warrant is unable to locate any such person, the special master shall seal and return to the court for determination by the court any item which appears to be privileged as provided by law.

(d) As used in this section, a "special master" is an attorney who is a member in good standing of the California State Bar and who has been selected from a list of qualified attorneys which is maintained by the State Bar particularly for the purposes of conducting the searches described in this section. These attorneys shall serve without compensation. A special master shall be considered a public employee, and the governmental entity which caused the search warrant to be issued shall be considered the employer of the special master and the applicable public entity, for purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, relating to claims and actions against public entities and public employees. In selecting the special master the court shall make every reasonable

effort to insure that the person selected has no relationship with any of the parties involved in the pending matter. Any information obtained by the special master shall be confidential and shall not be divulged except in direct response to inquiry by the court.

In any case in which the magistrate determines that, after reasonable efforts have been made to obtain a special master, a special master is not available and would not be available within a reasonable period of time, the magistrate may direct the party seeking the order to conduct the search in the manner described in this section in lieu of the special master.

(e) Any search conducted pursuant to this section by a special master may be conducted in such a manner as to permit the party serving the warrant or his or her designee to accompany the special master as he or she conducts his search. However, that party or his or her designee shall not participate in the search nor shall he or she examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served.

(f) As used in this section "documentary evidence" includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films or papers of any type or description.

(g) No warrant shall issue for any item or items described in Section 1070 of the Evidence Code.

(Enacted 1872. Amended by Stats.1899, c. 72, p. 87, § 1; Stats.1957, c. 1884, p. 3289, § 1; Stats.1978, c. 1054, p. 3250, § 1; Stats.1979, c. 1034, p. 3573, § 2; Stats.1980, c. 441, § 1; Stats.1982, c. 438, § 1.)

PROOF OF SERVICE

I am employed in the county of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 811 West Seventh Street, 11th Floor, Los Angeles, California, 90017.

On July 24, 1990, I served the foregoing document described as PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA on interested parties in this action by placing three copies thereof enclosed in a sealed envelope addressed as follows:

Clerk of the Court
The Supreme Court of the
State of California
4250 State Building
350 McAllister Street
San Francisco, CA 94102

Clerk of the Court
Court of Appeal
Second Appellate District
3580 Wilshire Boulevard
Room 301
Los Angeles, CA 90010

Honorable Curtis Rappe
Los Angeles Superior Court
Criminal Courts Building
210 W. Temple Street
Los Angeles, CA 90012

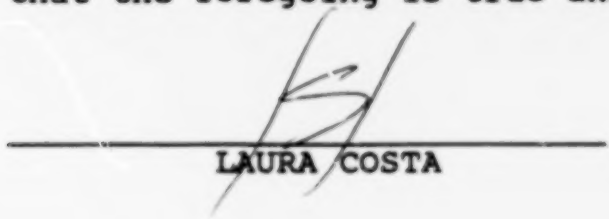
Linda Johnson
Deputy Attorney General
State of California
3580 Wilshire Boulevard
Room 800
Los Angeles, CA 90010

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed

invalid if postage cancellation date or postage meter date is more that one day after date of deposit for mailing in affidavit.

Executed on July 24, 1990 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



LAURA COSTA

(2)

No. 90-196

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STATE SALVAGE, INC.,
A CALIFORNIA CORPORATION;
COUNSEL FOR STATE SALVAGE, INC.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART, Chief Assistant
Attorney General
EDWARD T. FOGEL, JR.,
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Attorneys for Respondent

QUESTIONS PRESENTED

Whether an unreasonable search occurred when a search warrant was executed at a law firm for a client's records where: (1) the records were the raw business records of the client, State Salvage, for an audited period and two separate audits of these records revealed that State Salvage had defrauded the California Recycling Program; (2) one of these audits determined the amount of unsubstantiated claims submitted by State Salvage amounted to more than $4 million; (3) these records had been moved to the attorney's office; (4) during the execution of the warrant, one of the attorneys for the law firm led the special agents executing the warrant to the documents; and (5) the only claim of privilege was made as to the firm's own files on the client, and these files were

reviewed solely by a neutral Special Master.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90-196

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA,

BRIEF OF RESPONDENT IN OPPOSITION

* * *

STATEMENT OF THE CASE

On October 16, 1989,

California's Department of Justice,

Bureau of Investigation, was requested by

the Department of Conservation

(hereinafter DOC), the state agency which manages the state's recycling program, to investigate allegations uncovered during an audit of State Salvage, Inc., a certified recycler. DOC's audit found that approximately $4.8 million in fraudulent claims had been submitted by State Salvage. (Exh. A, p. 1 of Investigative Report.)[1/]

On October 19, 1989, of the California Department of Justice Bureau of Investigation Special Agent Hirigoyen was assigned to the investigation. He obtained a copy of DOC's audit report and interviewed the auditor who prepared the report as well as the auditor's manager. The audit covered the period of October

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1. All references, unless otherwise indicated, are to the Appendix to Petitioner's Peremptory Writ of Mandate filed with the California Court of Appeal on January 22, 1990.

1988 through July 1989. It concluded that State Salvage had billed the State of California Recycling Fund over $4 million for California Redemption Value, which had purportedly been paid to customers and consumers, but was not substantiated by receipts and logs as required by law. (Exh. A, p. 2 of Search Warrant and Affidavit.)

On November 15, 1989, Special Agent Hirigoyen met with Alan Cates, Audit Supervisor for the State of California's Controller's Office, who had done an independent audit of State Salvage for the period covering May 1989 through September 1989. Cate's audit concluded, too, that State Salvage had billed the State of California Recycling Fund for California Redemption Value purportedly paid to customers and consumers which was not substantiated.

(Exh. A, pp. 2-3 of Search Warrant and Affidavit.)

Cates informed Special Agent Hirigoyen that when he went to State Salvage's business location on October 25, 1989, in furtherance of his audit, he was informed by one of the employees that all of State Salvage's business records that covered the period of DOC's audit had been packaged and delivered to the law firm of Beck & DeCorso. He went to this law firm the next day, accompanied by Larry Lewinson, Vice-President and Manager of State Salvage, and met with Attorney Beck. Beck permitted Cates and Lewinson to look into the contents of the seven archive-size boxes of State Salvage business records in possession of the law firm. (Exh. A, p. 3 of Search Warrant and Affidavit.)

Special Agent Hirigoyen sought a

search warrant to obtain possession of State Salvage's business records that had been moved to their attorney's office (Beck & DeCorso) in order to conduct his criminal investigation to determine if State Salvate had criminally defrauded the State Recycling Program. His search warrant was first reviewed by State of California Supervising Deputy Attorney General Linda C. Johnson. It was then taken to Superior Court Judge William R. Pounders who signed the search warrant and appointed a Special Master to assist in the execution of the warrant. (Exh. A, pp. 1, 4-5 of Search Warrant and Affidavit.)

On November 21, 1989, at approximately 1:30 in the afternoon the search warrant was executed on the law office of Beck & DeCorso. Special Master Soladar, accompanied by three California Depart-

ment of Justice special agents, all dressed in business suits, exited the elevator and walked into a common reception area shared with other tenants on the floor. The only person present in addition to the receptionist was a courier. The agents requested to speak with either Attorney Beck or Attorney DeCorso. However, neither was present so the receptionist contacted Attorney Barrera, who works in the law firm. Attorney Barrera came out to the reception area. She was shown a copy of the search warrant and the Special Master as well as Supervising Special Agent King were introduced to Ms. Barrera. At some point it was explained to Ms. Barrera that the special agents were there to take possession of non-privileged material, but that only Special Master Soladar would take possession of

privileged material, which would be taken directly to court. (Exh. D, Decl. of King p. 1; Exh. D, Depo. Of Special Master Soladar p. 5; Exh. D, Decl. Phillips p. 1.)

When asked where the business records of State Salvage were located, Ms. Barrera led the men directly to a small office. She specifically touched the 13 boxes belonging to State Salvage. Ms. Barrera indicated that the law firm had not yet reviewed these records. When asked by Special Master Soladar whether she claimed any privilege to any of the contents of these boxes, Ms. Barrera replied, "No." She further stated that these were the raw business records of State Salvage. Thus, Special Master Soladar permitted the agents to begin taking possession of these boxes. The agents filled out property receipts

before carrying the boxes to their car. (Exh. D, Depo. of Special Master Soladar pp. 6-8; Exh. D, Decl. of Phillips pp. 2-3.)

Special Master Soladar then accompanied Ms. Barrera to her office where she had other material belonging to State Salvage to which she claimed a privilege. Special Master Soladar reviewed this material and retrieved the documents that he felt fell within the scope of the search warrant. Ms. Barrera was permitted to make a copy of these documents. Special Master Soladar then placed them in a sealed envelope and delivered them directly to the superior court. The entire sequence of events, from the arrival of Special Master Soladar and the agents until their departure, took approximately 1 hour and 10 minutes. (Exh. D, Depo. of Special Master Soladar

pp. 8-10, 14-15; Exh. D, Decl. of King p. 5.)

Within 3 days of the execution of the warrant, as permitted under California Penal Code section 1524, subdivision (c)(2)[2/], petitioners moved to quash the search warrant on the bases of the special master statute (Pen. Code section 1524) being unconstitutional on its face and unconstitutional as applied and the search warrant being facially defective.[3/] After a two day hearing, the Superior Court of Los Angeles County ruled that the special master statute is

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2. A copy of the statute is attached to Petitioner's Petition for Writ of Certiorari as Appendix E.

3. Petitioners also made a motion for a Franks v. Delaware 438 U.S. 154 (1978) hearing because they claimed that the search warrant affidavit contained material omissions and misstatements. However, Petitioners concede that only the motion to quash is at issue in the instant petition. (Petn. p. 14 fn. 4.)

not unconstitutional on its face, nor was it unconstitutionally applied, nor was the search warrant facially defective. (Exh. F, pp. 35-36, 159-160.)

On January 22, 1990, petitioners filed a Petition for Peremptory Writ of Mandate with the California Court of Appeal, Second Appellate District, Division One. On January, 21, 1990, the Court of Appeal denied the Petition without opinion. (Petn. Appendix D.)

Petitioners filed a Petition for Review with the California Supreme Court on February 9, 1990. This petition was denied on April 25, 1990, without an opinion. (Petn. Appendix A.)

* * * * * *

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF ARGUMENT

I

Petitioners seek certiorari review claiming that it is unreasonable to execute a search warrant for a client's business records which are in the possession of the client's attorney unless other lesser restrictive alternatives have been tried first. (Petn. pp. 17-18, 33-34.)

Respondent submits that, pursuant to precedent of this Honorable Court it is not unreasonable, as violative of the Fourth Amendment, to search an attorney's law offices. Moreover, to date, there has been no requirement that lesser alternatives be attempted before a search warrant may be secured.

In the instant case, great care was

taken to make the intrusion as minimal as possible. A special master was appointed and the special agents who accompanied him were dressed in business attire. Moreover, one of the attorneys of the firm led them directly to the boxes containing the raw business records of their client, State Salvage. It was only after the attorney claimed no privilege as to the contents of these boxes that the special agents took possession of them. Thereafter, the attorney led the special master to her office where he, and only he, reviewed the contents of some additional files to see if any of the documents fell within the parameters of the warrant. As to these files, the attorney claimed a privilege. Consequently, all of the documents removed from these files were placed in a sealed envelope and delivered immediately to the superior

court. The entire time span, from the special masters' and the agents' arrival at the law firm until their departure, was approximately 1 hour and 10 minutes.

Under these facts, the trial court properly found that the search was reasonable and, therefore, proper under the Fourth Amendment. Because its ruling is correct, no important issue is presented to this Court for its resolution. Consequently, petitioners request for certiorari review should be denied.

II

CERTIORARI REVIEW SHOULD NOT BE GRANTED BECAUSE PETITIONERS HAVE NOT RAISED AN IMPORTANT ISSUE; THE TRIAL COURT'S RULING THAT THE SEARCH OF THE ATTORNEY'S OFICE WAS RASONABLE IS IN ACCORD WITH PRECEDENT OF THIS COURT

Petitioners contend that the search of the law office of Beck & DeCorso for the business records of State Salvage was unreasonable within the meaning of the

Fourth Amendment because lesser alternatives were not tried before execution of the warrant. Petitioners amplify that, under the circumstances of this case, the lesser alternatives would have been: (1) informally requesting access to the documents; (2) obtaining a subpoena; or (3) providing advance notice to the law firm that the search warrant would be served. (Petn. pp. 17-18, 33-34.) The record demonstrates that the search was reasonable, and, therefore, proper under the Fourth Amendment.

First of all, this Court has held that search warrants directed against attorney's files in their offices are not per se unreasonable, as violative of the Fourth Amendment. Andresen v. Maryland 427 U.S. 463, 478-484 (1976). Therefore, inasmuch as searches of attorney's offices are not per se unreasonable, the

question in the present case is whether California Penal Code section 1524(c) permits unreasonable searches of attorney law offices when the attorneys themselves are not suspected of engaging in criminal activity.

As this Court has indicated in numerous cases, the key principle of the Fourth Amendment is reasonableness, which of necessity involves the balancing of competing interests. Delaware v. Prouse 440 U.S. 648, 653-654 (1979); Marshall v. Barlow's, Inc. 436 U.S. 543, 555 (1976).

Prior to the enactment of subdivision (c) of Penal Code section 1524 in 1979, allegedly privileged information in the possession of the professionals listed in this subdivision, including attorneys, could be lawfully searched for and seized without the assistance of a special master. See Deukmejian v.

Superior Court 103 Cal.App.3d 253, 162 Cal.Rptr. 857 (1980). However, because of concerns about the need to protect privileged material in the possession of these professionals versus the state's legitimate interest in combating sophisticated white collar crime, the Legislature adopted subdivision (c). This subdivision mandates the use of a special master to ensure the protection of the privileges involved, except where there is a reasonable suspicion of criminal activity on the part of the professional. Thus, subdivision (c) has dual purposes: (1) to protect privileged information in the possession of specific professionals; and (2) to combat white collar crime by permitting the search of suspects by normal warrant procedures.

To protect any privileged material in the possession of the professional at

the time the search warrant is executed, subdivision (c) specifically requires the following: (1) that a special master be appointed, who is a member of good standing with the California State Bar, who will accompany the person who will serve the warrant; (2) that, whenever practicable, the warrant be served during business hours; (3) that the warrant be served upon the party who appears to have possession or control of the items sought; (4) that the special master shall inform the party served of the specific items being sought and provide the party with the opportunity to provide the items; (5) that only if the party fails to provide the items requested, shall the special master conduct a search for the items in the areas indicated on the search warrant; (6) that if the party served claims a privilege to any of the

material, these items should be placed in a sealed envelope by the special master and taken to court; (7) that the special master keep confidential any information he obtains, except in direct response to inquiry by the court; and, (8) that, within 3 days of the execution of the warrant, the party searched is entitled to a hearing in superior court, where he can raise any suppression issues as well as claim a privilege to the items taken.

Thus, if is not per se unreasonable to search an attorney's office for attorney files, a statute such as Penal Code section 1524, subdivision (c), which adds numerous conditions upon the service of a search warrant on an attorney's office, is more stringent rather than less stringent in its requirement of reasonableness.

Further, the instant execution of

the warrant met the more stringent requirements of subdivision (c). A special master accompanied the special agents, who were all attired in business suits. They arrived at the law firm of Beck & DeCorso at approximately 1:30 in the afternoon, which clearly was during business hours. After stating their purpose, identifying the special master and his function, and permitting Ms. Barrera to review the search warrant, they requested to be led to the documents covered under the warrant. Ms. Barrera, an attorney very knowledgeable regarding the State Salvage matter, led them to the location of 13 boxes of State Salvage's business records, which she specifically touched to ensure there was no miscommunication regarding these boxes. She also pronounced that there was no privilege as to these documents because

they were the raw business records of State Salvage. It was only after this clear disclaimer of privilege that the special agents took possession of the boxes and began preparing a property receipt for the law firm. (Exh. D, Depo. of Special Master Soladar pp. 5-8; Exh. D, Decl. of Phillips pp. 2-3; Exh. D, Decl. of King pp. 1, 4.)

Thereafter, Ms. Barrera led the special master to her office where other files regarding State Salvage were kept. Only the special master looked through these files because Ms. Barrera claimed a privilege as to the contents. He removed only those items falling within the parameters of the search warrant; they were placed in a sealed envelope and taken directly to the court after he left the law office. This entire sequence of events only lasted approximately 1 hour

and 10 minutes. Ms. Barrera led them to all of the evidence; there was never any exploratory search for the items covered under the warrant. (Exh. D, Depo. of Special Master Soladar pp. 8-10, 14-15; Exh. D, Decl. of King pp. 3-5.)

Respondent submits that this was, indeed, a minimal intrusion upon the law firm, that was executed in a very reasonable and professional manner. Therefore, it in no way violated the Fourth Amendment, as the superior court properly so found. (Exh. F pp. 159-160.)

Petitioners, here, are making a novel request -- that the Court require that lesser alternatives be attempted prior to the execution of a warrant, in order for the execution to be reasonable under the Fourth Amendment.

No decision of this Honorable Court, to date, has made such a ruling and Peti-

tioners cite none. While lesser alternatives are perhaps always an option, they are not constitutionally mandated before execution of a search warrant can be a reasonable option. Respondent suggests that, once a search warrant has been selected as the appropriate method in a particular case for the retrieval of evidence, the issue before the court is not whether there were other options available but whether the warrant was properly executed within the meaning of the Fourth Amendment. And, as demonstrated above, the search warrant definitely was executed in a reasonable manner in the instant case.

Moreover, while many options may exist, it must be recognized that there are valid reasons for using a search warrant in an investigation, as opposed to other methods. In fact, this Court in

Zurcher v. Stanford Daily 436 U.S. 547 (1977), not only noted the importance of the search warrant in a criminal investigation, but also clearly articulated one of the reasons why a search warrant is sometimes preferred over a subpoena duces tecum, one of the lesser alternatives specifically mentioned by petitioners.

> "As the District Court understands it, denying third-party search warrants would not have substantial adverse effects on criminal investigations because the nonsuspect third party, once served with a subpoena, will preserve the evidence and ultimately lawfully respond. The difficulty with this assumption is that search warrants are often employed early in an investigation, perhaps before the identity of any

likely criminal and certainly before all the perpetrators are or could be known. The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends or at least not to notify those who could be damaged by the evidence that the authorities are aware of its location. In any event, it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena duces tecum, offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, what-

ever the good faith of the third party.

"Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of [a] crime, involves hazards to criminal investigation much more serious than the District Court believed. . . ." Zurcher v. Stanford Daily, supra, at p. 561.

In sum, petitioners have failed to show that the ruling of the trial court was incorrect in light of precedent established by this Court; therefore, they have failed to establish that this case presents an important issue that must be resolved by this Court.

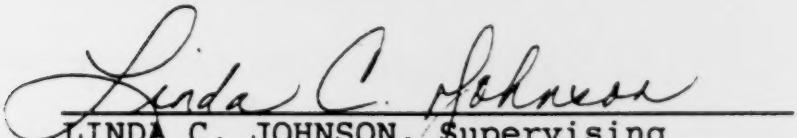
CONCLUSION

For the foregoing reasons, respondent requests that the Petition for Certiorari be denied.

DATED: October 30, 1990.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART, Chief Assistant
Attorney General
EDWARD T. FOGEL, JR., Senior
Assistant Attorney General
ROY C. PREMINGER,
Deputy Attorney General



LINDA C. JOHNSON, Supervising
Deputy Attorney General
[Counsel of Record]

Attorneys for Respondent

LCJ:lh
LA89IV0018

DECLARATION OF SERVICE BY MAIL

Re: STATE SALVAGE, INC., A CALIFORNIA CORPORATION; COUNSEL FORSTATE SALVAGE, INC., v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

No. 90-196

I, JOSEPHINE D. ROSE, declare that I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served three copies of the attached

BRIEF OF RESPONDENT IN OPPOSITION

on each of the following, by placing in an envelope addressed as follows:

The Supreme Court of the
State of California
3580 Wilshire Blvd., Rm. 213
Los Angeles, CA 90010

Clerk of the Court
The Supreme Court of the
State of California
4250 State Building
350 McAllister St.
San Francisco, CA 94102

Hon. Curtis Rappe
Los Angeles Superior Court
Criminal Courts Building
210 W. Temple St.
Los Angeles, CA 90012

Clerk of the Court of Appeal
Court of Appeal
Second Appellate District
3580 Wilshire Blvd., Rm. 301
Los Angeles, CA 90010

Mark E. Beck
Beck & DeCorso
811 W. 7th St. 11th Flr.
Los Angeles, CA 90017

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Each said envelope was then, on NOV 1 - 1990 sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOV 1 - 1990 at Los Angeles, California.

Declarant

JOSEPHINE D. ROSE

LCJ:lh
LA89IV0018